



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 8, 2004

Ms. Jennifer Soldano
Associate General Counsel
Texas Department of Transportation
125 E. 11th Street
Austin, Texas 78701-2483

OR2004-0155

Dear Ms. Soldano:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 193872.

The Texas Department of Transportation (the "department") received a request for the requestor's personnel file and medical records. You state that the department will withhold Texas driver's license numbers under section 552.130 of the Government Code pursuant to a previous determination of this office issued to the department in Open Records Letter No. 2002-0465 (2002). *See* Gov't Code § 552.301(a), (f) (allowing governmental body to withhold information subject to previous determination); Open Records Decision No. 673 (2001). You claim that some of the requested information is excepted from disclosure under sections 552.101, 552.102, and 552.117 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. You contend that the requestor's medical file, Exhibit C, is excepted from disclosure under section 552.101 in conjunction with the Family and Medical Leave Act (the "FMLA"). We note that section 825.600 of chapter V of volume 29 of the Code of Federal Regulations provides that

¹To the extent that additional responsive information exists, we assume the department has released it to the requestor. If not, the department must do so at this time. *See* Gov't Code §§ 552.006, .301, .302; *see also* Open Records Decision No. 664 (2000) (noting that if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

(g) [r]ecords and documents relating to medical certifications, recertifications, or medical histories of employees or employees' family members, created for the purposes of the FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files, and if ADA is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements[.]

29 CFR § 825.600(g). You also assert that Exhibit C is confidential under the Americans with Disabilities Act of 1990 (the "ADA"). Because the FMLA defers to the confidentiality provisions of the ADA when the ADA is applicable, we will address whether Exhibit C is confidential under the ADA.

The ADA provides for the confidentiality of certain medical records of employees and applicants. Specifically the ADA provides that information about the medical conditions and medical histories of applicants or employees must be 1) collected and maintained on separate forms, 2) kept in separate medical files, and 3) treated as a confidential medical record. In addition, information obtained in the course of a "fitness for duty examination," conducted to determine whether an employee is still able to perform the essential functions of his job, is to be treated as a confidential medical record. 29 C.F.R. § 1630.14(c); *see also* Open Records Decision No. 641 (1996). The Equal Employment Opportunity Commission (the "EEOC") determined that medical information for the purposes of the ADA includes "specific information about an individual's disability and related functional limitations, as well as, general statements that an individual has a disability or that an ADA reasonable accommodation has been provided for a particular individual." *See* Letter from Ellen J. Vargyas, Legal Counsel, EEOC, to Barry Kearney, Associate General Counsel, National Labor Relations Board, 3 (Oct. 1, 1997).

We understand that the documents in Exhibit C are contained in a separate medical file maintained in accordance with the ADA. You state that there appears to be no provision permitting the release of confidential information with the consent of the employee or after the employee's death. After reviewing your arguments and the submitted documents, we find that Exhibit C is confidential under the ADA and must be withheld under section 552.101 of the Government Code. The exceptions to section 12112(d) of the ADA are not applicable in this instance. Therefore, the department must withhold Exhibit C in its entirety.²

Next, you assert section 552.117(a)(1) of the Government Code in regard to some of the information in Exhibit B. This section excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be

²As we are able to make this determination, we need not address your argument under section 552.102 of the Government Code.

kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). However, information subject to section 552.117(a)(1) may not be withheld from disclosure if the current or former employee made the request for confidentiality under section 552.024 after the request for information at issue was received by the governmental body. Whether a particular piece of information is public must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). We agree that you must withhold the submitted social security numbers in Exhibit B under section 552.117(a)(1) of the Government Code for employees who timely elected to keep their personal information confidential. The department may not withhold this information under section 552.117(a)(1) for employees who did not make a timely election to keep this information confidential.

If a timely election was not made, we note that social security numbers must be withheld in some circumstances under section 552.101 of the Government Code in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* You inform us that the department maintains employees' social security numbers pursuant to provisions of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. § 653a(a)(2)(B), (b)(1)(A). Under this federal law, an employer is required to furnish to the Directory of New Hires of the State in which a newly hired employee works, a report that includes the employee's social security number. 42 U.S.C. § 653a(b)(1)(A). Thus, we agree that the department must withhold the social security numbers of department employees whose numbers were collected pursuant to this law. For employees who were hired before this law was enacted, social security numbers were not obtained or maintained pursuant to the law and therefore, those numbers may not be withheld under section 552.101 and the federal law.³

Finally, we note that under section 552.023 of the Government Code a person or a person's authorized representative has a special right of access to records that contain information relating to the person that are protected from public disclosure by laws intended to protect that person's privacy interests. Therefore, the requestor and his representative have a special right of access to the requestor's social security number and section 552.130 information, and they must be released in this instance.

In summary, we conclude that: 1) the department must withhold Exhibit C in its entirety under section 552.101 of the Government Code in conjunction with the ADA; 2) if a timely

³ Although you also note that section 158.203 of the Family Code constitutes a statute enacted after October 1, 1990 that requires the collection of certain employees' social security numbers, you have not argued that this provision of law is in fact applicable in this instance. Accordingly, we do not address the applicability of section 158.203 in this instance.

election was made under section 552.024, the department must withhold the section 552.117(a)(1) information; 3) the department must withhold social security numbers made confidential under federal law; and 4) the requestor and his representative have a special right of access to the requestor's social security number and section 552.130 information.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



W. Montgomery Meitler
Assistant Attorney General
Open Records Division

WMM/lmt

Ref: ID# 193872

Enc: Submitted documents

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